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NATIVE LAND CLAIMS AND NORTHERN HYDROCARBON DEVELOPMENT IN THE BEAUFORT SEA - MACKENZIE DELTA REGION

A Report Prepared for

BEAUFORT SEA ALLIANCE

BY

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J.E. Chamberlin

January, 1983

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NATIVE LAND CLAIMS AND NORTHERN HYDROCARBON DEVELOPMENT

IN THE BEAUFORT SEA - MACKENZIE DELTA REGION

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NATIVE LAND CLAIMS AND NORTHERN HYDROCARBON DEVELOPMENT IN THE BEAUFORT SEA - MACKENZIE DELTA REGION

This is a report about native land claims and northern hydrocarbon development proposals. When I refer to native land claims, I mean the comprehensive claims put forward by the Committee for Original People's Entitlement (COPE) on behalf of the Inuit of the Western Arctic; by the Dene Nation and Metis Association of the Mackenzie Valley; by the Council for Yukon Indians (CYI); and by the Inuit Tapirisat of Canada (ITC) on behalf of the Inuit of the Central and Eastern Arctic; but I also mean the general principles which confirm the place of native interests at the centre of any comprehensive and responsible account of the past, present and future of the north of Canada. When I refer to northern hydrocarbon development, I mean the particular proposals put forward by Dome Petroleum Limited, Esso Resources Canada Limited and Gulf Canada Resources Limited on behalf of all hydrocarbon development lease-holders in the Beaufort Sea - Mackenzie Delta region, and embodied in their Environmental Impact Statement released in the fall of 1982; but I also mean the general assumptions and expectations which sustain large-scale industrial ventures in the north.

The antagonism between the proponents of native land claims and the proposers of hydrocarbon development is a fact of life in the north. This is not to say that native people are against change, or that native land claims are inconsistent with hydrocarbon development...though either of these may well be true in particular instances. It is simply to say that the prerogatives of native land claims require a definition independent of the prerogatives of hydrocarbon development, and that this independence presumes an acknowledgement of their differences, and of their sometimes conflicting

priorities. One sign of this is antagonism between them. It is not the only sign, nor necessarily the most desirable; but in the absence of a serious and thoroughgoing consideration of the nature and the extent of their differences, it may be the most enduring one. This is the challenge facing the Beaufort Sea Environmental Assessment Panel; and I suggest that it should meet the challenge in several ways.

1. The Beaufort Sea Environmental Assessment Panel should accept its responsibility to provide for the fullest possible expression and consideration of native land claims, inviting rather than ignoring the awkward issues, and intensifying rather than obscuring their distinctive and autonomous character. There is nothing quite like northern native land claims in the Canadian social, economic and political sphere; just as there is nothing quite like the Beaufort Sea - Mackenzie Delta oil and gas fields. And the distinctiveness of native land claims in the north is only partly sustained, and not very effectively promoted, by the negotiating process to which the federal government and the claimants are committe What the Beaufort Sea Environmental Assessment Panel can do is to provide a forum other than the negotiating table for acknowledging the different priorities which sustain native land claims, a forum which would shift the balance to create an obligation on the hydrocarbon developers to respond to the prerogatives of land claims, rather than the other way around, and which would create a context in which native land claims might be accepted as the premise of northern development.

2. The Beaufort Sea Environmental Assessment Panel should advise the federal government to approach constitutional issues with regard to the native people in the north as a framework for political development as well as a protection for certain rights; and as a context for northern development consistent with native priorities, as well as a guarantee of federal energy preregatives. Only in this way will native land claims generate a set of social, economic and political structures which will be sufficiently autonomous to sustain the authority of native interests in the context of hydrocarbon development proposals.

3. The Beaufort Sea Environmental Assessment Panel should direct the hydrocarbon developers to attend to the idea of community which informs native land claims in the north, and direct the government to attend to the need for diversified regulatory control and jurisdictional autonomy that will sustain the life and livelihood of communities within the framework of comprehensive planning. At present, the hydrocarbon developers generate the illusion that regional planning will complement their industrial aspirations. But when they run up against a consistent planning document, in which the people whose interest should come foremost have got there first--a planning document such as the agreement-in-principle reached between the Committee for Original People's Entitlement and the government of Canada--the developers immediately cry foul. It is not the developers' fault; they simply don't know any better, because they misunderstand native land claims and the status of native interests in a developing north. So the developers and the governments that encourage them must be instructed in the significance of certain priorities, especially the priorities of those who were in the north first, and will be there last. That is the responsibility of the Beaufort Sea Environmental Assessment Panel.

4. Finally, the Beaufort Sea Environmental Assessment Panel should address the concept of risk-taking as it applies to hydrocarbon development ventures, and include within the notion of risk not just capital risk but community risk, which should allow to the risk-takers a similar range of rewards and controls as those allowed to, or more precisely insisted upon by, the financial backers of these projects. The point here is that these risks constitute different kinds of risks, not adequately acknowledged by the aggregate statistics available in the developers' Environmental Impact Statement, nor by abstract ideological analyses, but only by an attention to the ways in which these differences are reflected in and promoted by native land claims.

Both the native land claims and the hydrocarbon development proposals which fall within the broad considerations of the Beaufort Sea Environmental Assessment Panel deal with general strategies, and both envisage the working

out of particular structures--modes of governing or gathering--in the light of agreements yet to be reached. Therefore I have divided my comments into two parts. The first part deals with what I take to be the general issues arising from the conjunction of native land claims and proposals for hydrocarbon development in the Beaufort Sea - Mackenzie Delta region. The second part deals with some specific issues. In the latter part, I have chosen instances that seem to me typical of the kinds of conflicts that arise when particular land claims are juxtaposed with particular development proposals. I have not attempted to cover all the specific issues, or to be comprehensive in my account of particular claims, since in the changing circumstances of land claims negotiations this seemed to me a mistaken ambition.

Some conflicts have arisen already. Some will inevitably arise. And some may arise unless steps are taken to ensure the autonomy of the prerogatives of land claims. But in all cases the scheme is similar: the interests of native people are assumed to exist only within contexts defined by the interests of industry and government. If this is not reversed, and the contexts proposed by native land claims established as the premise for northern development, then the effect of Beaufort Sea - Mackenzie Delta hydrocarbon development proposals will be to obliterate both the distinctive interests of which land claims are the image, and the particular opportunities which they and they alone hold promise of for the native people of the north. And if the native people lose this opportunity, the north does too; and northern development will be an impoverished and temporary phase in Canadian economic and social history.

I see native land claims as a probable opportunity for development of the north. I see hydrocarbon development proposals as a possible opportunity. I suggest that it makes simple good sense to go with the probable opportunity first, and to see the possibilities of hydrocarbon development in the context

of the probabilities of native land claims settlements, rather than the other way around. And I suggest that the coexistence of native interests and hydrocarbon development depends before all else upon an acknowledgement of their differences, and that any reconciliation of these differences must begin with the general premises of native land claims rather than with those of hydrocarbon development proposals, and with a specific recognition of the autonomous interests represented by particular land claims. Insofar as this does not happen, native land claims will be subverted and their settlements compromised, for central to native land claims is the principle that northern development begins here.

Part I

"No bird soars too high if he soars with his own wings". It has the sound of an Indian or Inuit proverb. In fact, it was written by the eighteenth century English poet William Blake and included in The Marriage of Heaven and Hell, an acid tongued version of the Old Testament Book of Proverbs. Blake was one of those awkward writers who mean exactly what they say--he would have made a very poor negotiator--and one of the things he said was that whoever disregards differences is a fool. This may not seem like an exceptional insight, but it appeared to Blake that this was exactly what the religion of his day was trying to do, with its inclination towards compromise and its indifference to uncompromising distinctions. It was also, in Blake's opinion, just the sort of thing that the new social sciences would in their turn try to do as they became the religions of the nineteenth and twentieth centuries, and committed themselves to the aggregate truth of statistics and the abstract beauty of ideologies. Blake had a simple explanation for all this foolishness: people were not seeing things clearly, or else where not recognizing what they saw. What Blake saw, clearly enough, was that there were important

differences between things and ideas, differences that could not be explained away as matters of perspective, or of taste. They were matters of fact. Simple matters, really, especially when illustrated by some of Blake's proverbial examples. "The cistern contains; the fountain overflows". All that one needs to know are some things about cisterns and fountains, and some things about water. Not knowing these things, or not recognizing them, one could easily make a fool of oneself. C.S. Lewis used to say that if a person does not understand that the great medieval love poem called 'The Romance of the Rose' could not be retitled 'The Romance of the Onion', then that person needs to learn something about roses and onions, and something about love. It is a matter of competence, not in reading poems, but in the ways of life and nature. Or of incompetence. One of the standard types of linguistic incompetence is often illustrated by uninformed analogies, such as moving from the declension prince-princeling to boy-boiling. Common sense is here glorified by the name of competence, in order to draw attention to the affinities between foolishness and incompetence. What I will suggest in this report is that on the basis of the performance to date, the official consideration of the relationship between native land claims and the Beaufort Sea - Mackenzie Delta hydrocarbon development proposals may be incompetent or foolish or both, combining false analogies with blurred perceptions to arrive at a confused and confusing interpretation.

William Blake felt that his contemporaries did not know anything about the things that mattered most. His insistence on differences was to illuminate the essential autonomy of things themselves, their separate prerogatives, that which makes them what they are. Smudge this distinctiveness, and you lose a sense not only of the difference between things, but also of their similarity, and of the nature of them both--or, in the case of native land claims and hydrocarbon development proposals, we lose a sense of the nature of the north.

Which is to say that in certain--in all of the most important--matters, we cannot have the idea of distinctive interests without the idea of opposing interests. If a person--if the Beaufort Sea Environmental Assessment Panel, in particular--does not see and does not say something about the difference between the north as a homeland and the north as a frontier, there is no possibility of a developing north which sustains the prerogatives of both. There may, indeed, be little possibility of northern development, in any responsible sense of the words. Homelands and frontiers, no less than cisterns and fountains, belong in the same world only if each is given its due. If they are to co-exist, they must first exist separately. And both native land claims and Beaufort Sea - Mackenzie Delta hydrocarbon development proposals exist first in the form of language, of texts; and then in due course take the form of social, economic and political structures or of artificial islands, harbours, tankers and pipelines.

The first sentence of Volume One of the Environmental Impact Statement asks a question. "Is Canada and the North ready for Beaufort Sea - Mackenzie Delta oil production?" The grammar is faulty, and the question is rhetorical, but of course we take the question seriously. There is no reason not to take equally seriously the questions posed by native land claims. And there is no reason not to put the questions posed by land claims first. Beaufort Sea - Mackenzie Delta hydrocarbon development proposals are no more 'realistic' than native land claims. In one sense, land claims have a more precise and a more permanent reality than hydrocarbon development proposals, since they provide a more coherent imaginative vision than the shifting components of land use planning in the north to which the industry Environmental Impact Statement depends for its logic. Native land claims are more than a match for the visions of the hydrocarbon developers. But they need to be given a chance, and to have their autonomy recognized.

Human beings and human societies have two basic choices: to let things happen, or to make things happen. Making things happen begins with the imagination, a taking control of reality; letting things happen begins with a suspending of the imagination, a surrender to reality. If one went into business by simply surrendering oneself to the forces of the market place, not only would the venture be mindless and unimaginative, but it would probably fail. It is through inspiration and invention, through imaginative preparation, through taking control of circumstances, that businesses are made successful. Native land claims are a way of ensuring that the native people of the north get into, and stay in, their own kind of business.

Native land claims are not easily defined. Their subject--what they are about--has a hovering kind of presence, but at times seems to elude exact description. We need to become more comfortable with this sort of elusiveness. Or we need to recognize it as a sort of elusiveness with which we are in fact quite comfortable in other circumstances--in hydrocarbon development proposals, for instance, which are 'about' pipelines or profits or self-sufficiency or opportunity or the national interest, or a number of other things, depending on one's perspective. But native land claims are different, in that they are a kind of creed, a way in which the native people can say "I believe". What they must be turned into is a network of laws and institutions, into ways of living according to the beliefs which they embody. But this is not all. Someone else has to believe as well--in this case, the community at large, the people represented by the Beaufort Sea Environmental Assessment Panel and the federal negotiators of land claims. Credo: I believe. Credit: he believes. The native people need a line of political, social and economic credit--an acknowledgement of the legitimacy of their belief in themselves and in their future, and a sharing of their belief in an Indian and Metis and Inuit way of life in the north, the homeland of the people. It is a way of life which can make things happen, and then can let things happen.

Native land claims emerge out of a complicated conceptual tapestry in which spiritual values and material ambitions are interwoven, within a framework moulded out of a blend of high idealism and real politik. Furthermore, the negotiating structure to which the claimants are at this point committed reinforces a sense of the essence of these claims as elusive, what I referred to as a kind of hovering presence. But this hovering presence is much more than a dream or a delusion. In fact, hovering presences--nationalism, for instance--often have a more substantial presence in the long run than such things as pipelines or tarrif rates, and indeed often overwhelm them. In turn, Beaufort Sea - Mackenzie Delta hydrocarbon development proposals, rather than native land claims, might be described as dreams or delusions, depending on one's perspective. And yet behind these proposals there is the engine of industrial progress, with its relentless imperatives and its insatiable need for track to run on and fuel to keep it going. This, too, can overwhelm.

So it may not be easy to say exactly what either native land claims or Beaufort Sea - Mackenzie Delta hydrocarbon development proposals are about, unless we agree that they are about who is in charge, about the control of the future of the north. Not ruthless control, mind you...just control: subtle and sensitive control, insofar as these words are translatable from the language of native land claims to that of hydrocarbon development proposals. One foot on the throttle, the other on the brake, both hands on the steering wheel...that will do just nicely. Both sides agree that someone else--the parliament of Canada, say--will make the rules of the road, and make the road too. What is not clear is whether native land claims and Beaufort Sea - Mackenzie Delta hydrocarbon development proposals are in the same car, or on the same road...and what will happen at the intersection somewhere up ahead. That is a question that the Beaufort Sea Environmental Assessment

Panel must address.

Whatever else they are, native land claims do one obvious thing. They confirm a simple fact, the fact of a significant presence in the north, the presence of a significant number of native people. Native land claims may in some respects be a temporary phenomena, but they envisage not a temporary but permanent change in the political and economic and social geography of the north. Indeed, they themselves constitute something of a change, for the north will never be the same since native land claims have been on the map.

What I refer to as the autonomy of land claims is not an ideological but a local autonomy; and the particular subject of a particular land claim is in each instance located in a unique place and time. The claim put forward by the Committee for Original People's Entitlement, now transformed into the agreement-in-principle between COPE and Canada, is not the same as the claim of the Council for Yukon Indians, or as the claims of the Dene and Metis of the Mackenzie Valley, or the Inuit of the central and eastern Arctic. And is no less--and of course no more--distinct and autonomous than the other northern native land claims.

Furthermore and leaving the lawyers aside for a moment--the COPE claim, like the others, can be said to be distinct because it is the articulate expression of the aspirations of a group of people. Not all of their aspirations, and not entirely articulate, but nonetheless an expression, which has taken the further form of a negotiated agreement-in-principle which embodies fewer aspirations but is more articulate in its choices. The other claims vary, and are at various stages of development, for native land claims like all forms of imaginative expression change over time. But each of the land claims is distinct unto itself, as well as having a common inspiration in the desire of the native people of the north to take control over their own lives.

All societies have a collective way of taking imaginative control of their world, of making things happen their way, of being in business. We usually refer to it as 'culture', the embodiment of all those things that make one's life distinct, that make life worth living. These include the arts and education--the ways in which a society draws out the particular genius of its people, and crams in a few things as well--and also such things as its cooking and recreation. These are images of social relationships, values and ambitions--as anthropologists have been insisting for about a century--and these images extend to modes of material production and distribution within the society, to its ways of doing business as we usually understand the phrase. Such things as national declarations and constitutions, however imperfect, provide specifically abstract images of the aspirations and achievements of a society, and are often expressed in what can seem to the outsider like excruciatingly unrealistic phrasing, talking about "liberty, equality and fraternity", or "life, liberty and the pursuit of happiness". But such phrases, such images, make things happen. Land claims have their share of such apparently impractical phrases, and they share an ambition to make things happen. To treat them as elements to which things happen is to ignore the nature of land claims; and to ask what the effect of hydrocarbon development will be on native land claims is something like asking what the effect of George III's trade policies might be on the French Revolution, or the American Revolution. It's all backwards. I am not trying to make land claims out to be more than they are. But the consistent failure in the past has been to assume that they are less than, or different from, what in fact they are. They must be seen on their own terms, which can then be acknowledged as the terms of reference for northern development.

Beaufort Sea - Mackenzie Delta hydrocarbon development proposals, and the way in which they are considered by the Beaufort Sea Environmental

Assessment Panel, may obscure the need for this kind of recognition. If this happens, a grave disservice will be done to the north, and to Canada, a disservice which will effectively corrupt not only what is done but the way in which people see and think about the north and its people, and about the nation as a whole. What is needed is a full account of the autonomous prerogatives of native land claims, and of the necessary antagonism between land claims and hydrocarbon development proposals. This antagonism does not imply that they cannot coexist; rather, it is the only context in which they can responsibly coexist. Canada is particularly gifted at devising ways of recognizing different interests--regional (or provincial and territorial) and central (or federal) for example. It is not good--and it must never become adept--at finally resolving these interests. They must keep emerging in new and awkward forms, insisting on their separate autonomies, re-establishing their separate interests, if the confederation is to maintain its vitality. And this must be the case for the north, and for native interests, as well. They are as yet an unrecognized part of confederation; and the Beaufort Sea Environmental Assessment Panel has an opportunity to contribute to that necessary recognition.

When are land claims going to be settled? Never, if what one means by "settled" is "laid to rest". To assume that they will be, is to misunderstand native land claims, and to misread history. Of course, there will I trust be negotiated settlements of land claims, which will address contemporary issues that affect native people in the region, and the settlements will be particularly necessary to establish in an unmistakable way the notion of land claims interests as a fact of life in the north. But if land claims are to the north what I think they are--that is, expressions of the will of a people, articulated as always by a few of the people--then they need to be kept alive, not laid to rest. One way of doing this is to translate a

specific land claim into a specific sort of sovereignty, usually taking the form of a territorial designation and certain political prerogatives. This may in some cases be the best way, and it certainly is a possible way, and it will probably be a northern way with respect to some of the native land claims-say, in the Mackenzie Valley, and the Central and Eastern Arctic. But it is not the only way.

Land claims constitute one of the few expressions of the possibilities of a community based polity, a social structure and political economy of community. The alternatives, with which we are familiar, are individual or more broadly collective political ideologies on the one hand, and the political economies of supply and demand or of class interests on the other, which find a form in the different prerogatives of free enterprise or state control. Much of the effort of social scientists and politicians over the past century has been to find ways of reconciling the interests of free and regulated enterprise, and the process in which the Beaufort Sea Environmental Assessment Panel is engaged is less a matter of engineering or environmental terms and conditions than it is a matter of fusing social and capital interests. Native land claims change the scheme, by introducing the prerogatives of community interest, prerogatives which have their own sort of autonomy and their own sort of antagonism to other interests, and which are set at risk in a new way by hydrocarbon development proposals.

One thing that tends to happen is that there emerges a laudable but misdirected concern on the part of hydrocarbon developers to prepare the communities for change, and to introduce into the communities some mechanisms which will ensure a more efficient response. But this can be just the wrong thing. The strength of northern native communities, as indeed of all communities, is in feeling themselves in relative control of events. This is not a luxury but a necessity for the integrity and autonomy of the communities.

And since it is a set of communities which are at the heart of each of the native land claims, it is a necessity if one has any concern for the integrity and autonomy of land claims.

What is in question is not whether the communities should be ready to respond to change, for of course they should. What is in question is whether the ways proposed routinely by hydrocarbon developers are appropriate, and whether it is appropriate that hydrocarbon developers should propose or initiate these ways, which tend to be of two kinds. The first is to see change as an opportunity for individual enterprise, for jobs. The second is to see change as creating a need for social services to cope with new stresses affecting individuals, and through their welfare affecting the communities. What is missing is any analysis of the needs of the community itself as an organic whole, as an item in itself. Both responses assume that individual concerns take precedence over collective concerns. Without in any way diminishing the importance of or the need for attention to individual concerns, I suggest that the possibilities of individual opportunity should be understood as depending upon, rather than as sustaining, the integrity of the community as a whole. We tend to accept this easily when it comes to our neighbourhoods, or our nations; but we tend to ignore or dismiss it when it comes to the Inuvialuit or the Dene, or to the people of Fort Macpherson or Holman Island or Old Crow. Not exactly ignore the communities, but rather pay them the wrong kind of attention. Any social group is made up of constituent individual parts, and these parts contribute to the whole in a complicated way. Without its parts, the whole would obviously not exist; with them, it becomes something more than and different from the simple sum of those parts. Though we all have some experience in admitting this latter notion, most of us pay our daily dues to the ideological premises of liberal individualism, and perceive the constituent parts rather than the whole as

the focus of our moral and political attitudes. In this way, we view the state or social group as a necessary and perhaps even quite remarkable convenience, the embodiment of a contract or the fulfilment of a design, which essentially exists to serve and protect our individual interests. But if we shift our vision, and posit that the larger social entity is not one to which we (however theoretically) elect to belong but within which we find ourselves, willy nilly, then we view it as a natural organic form rather than as the product of ingenious artifice. That is, we either look upon the individual as prior to the community, and giving to the community its significance; or we perceive the individual as receiving life and meaning from the community, much as the branch does from the tree. If we accept the former scheme, we value our individuality above all else, and the community insofar as it enhances this. The latter attitude, on the other hand, implies that our individuality derives from and depends upon our belonging to a social group, or a community, or being citizens of a nation. It emphasizes the social group as a natural and inevitable family of interests--one does not choose one's parents, as it were--rather than as an artificial and convenient one--one does choose one's place of residence. This emphasis on the natural priority of the social group or community or nation essentially informs native land claims, and it informs the concomitant commitment to the native community or group as the only appropriate--indeed as the only possible--instrument for the achievement of individual native interests.

This must be recognized as an essential northern reality. One need not share it, or even like it, but one must acknowledge it, if the autonomy of the groups putting forward land claims is to be respected, and if the interests informing land claims are to be given their due. If the Beaufort Sea Environmental Assessment Panel is to do its job, it must openly challenge the premise that the initiative is all elsewhere, that things can only happen <u>to</u> the

native groups, that making things happen is a prerogative that belongs with industry and with government. Otherwise, native land claims and their forthcoming settlements are in trouble, and there will be cause to complain that those interests which are embodied in land claims have been compromised by Beaufort Sea - Mackenzie Delta hydrocarbon development.

Native land claims need to be seen both for what they are, and for where they belong in the larger scheme of things. They are more than the simple sum of the acreages and rights and institutions and dollars that will be features of their settlements. They exist almost independent of these elements, in two respects. First, they are one of the key components of the structure of northern affairs. In fact, there are only two other elements: the managers--the federal and territorial governments; and the developers--oil and gas, mining and hydroelectric power. Government: industry: native land claims. If not an eternal, at least a perennial triangle. Of course, some native people can be found on either the manager's or developer's side--and it may be that settlements of native land claims will transform these functions --but at present native land claims have a distinct autonomy and authority. They represent the abiding interests of the native people of the north, in a way that acknowledges the situation in which they are put forward. They are as realistic, in their own terms, as Beaufort Sea - Mackenzie Delta hydrocarbon or any other development proposals. Indeed, as I have suggested they are in a sense more realistic, since they map out the basis of a permanent rather than a temporary prosperity for the north. There are several native land claims, just as there are several governments, and several industries... and so the triangle takes on a different shape in the Mackenzie Delta and in the Yukon and in Denendeh or Nunavut. But it is still a triangle. Some people, on all sides, would like to see the triangle collapse, so that the industrial and the governmental interests become one, or the native and the

governmental, or the native and the industrial; then the triangle might become a straight line. But right now, and for the foreseeable future, it is a triangle. This of course has nothing to do with the merits of either governments or industries or native land claims. Once again, you can like them all, or some, or none. Just as you may like or dislike mountains or valleys or rivers. But whether you like them or dislike them, at present they are not about to go away. They might as well be recognized as key facts of life in the north. And native land claims constitute one set of facts.

Here we face the second way in which native land claims exist almost independent of their constituent elements. Not only are they part of the structure of northern affairs, but they are a part of the structure of native affairs in Canada as a whole, and thereby a part of structure of national affairs. They are a new phase, the latest phase, in a history of relations between native and non-native people in North America. If there is one thing that is certain, it is that the claims of the native people to a place in the territorial, provincial and national political structure, and to a role in economic and social development in Canada, are with us permanently. Claims settlements will not obliterate claims, but translate them out of their present narrow legal and administrative straightjacket into effective social, economic and political forms. Whether looked upon as claims to sovereignty or land or money or rights or privileges or all of these, native land claims embody each group's current perceptions of its permanent interests, and of how to protect them. Each of the claims in theory holds the promise of providing permanent recognition--or to use a more apt word, permanent nourishment--for these changing interests, or the inevitably changing perceptions of them. Native land claims in the north are part of a larger Canadian scheme which over the next few years will incorporate new forms of Indian government, a new Indian Act, and new arrangements flowing from the

new constitution, the charter of rights, and the constitutional conference providing for this March under section 37 of the Constitution Act. In this scheme, native land claims have an importance that is both substantial and symbolic, and their settlement will become part of that larger world of native affairs in Canada. For this reason, northern native people are at pains to emphasize the differences as well as the similarities between their situations and those of their southern counterparts, emphasizing the specifically northern characteristics of the pattern of white encroachment that has precipitated these claims, and the different possibilities that exist in the north for achieving a genuine political, economic and social acknowledgement of their present and their future place. In some respects, this may become a model--the federal negotiators fuss that it may be an expensive precedent--for redefinitions in the south of the principles and implications of treaty settlements. But in the main, the emphasis is on the difference, on the north and the northern situation as unlike that in any other part of the country. This is of course the argument that the oil and gas developers make when they ask for preferential tax regimes or encouraging leasing arrangements; and it is the attitude of the regulators, who are committed to a "need to know" policy that means things for the north that it does not mean for other jurisdictions. If oil and gas developers and the governments can so successfully claim that the north is unique, and requires unique approaches and unique concessions, then surely the native people can plausibly claim this as well, and can do so as one side of that northern triangle. For their claim to special attention in the history of native affairs is a claim based in part on their special geographical place, as well as on a special historical time. It is the responsibility of the Beaufort Sea Environmental Assessment Panel to ensure that the uniqueness of the north is highlighted in a way that does justice to the character of native land claims as well as to the special

enterprise of industrial development and changing government functions.

Part II

The general issues arising from the conjunction of native land claims and proposals for hydrocarbon development in the Beaufort Sea - Mackenzie Delta region are represented by one simple but lamentable fact--the fact that the interests of native people are assumed to exist only within contexts defined by the interests of industry and government. I have suggested why this must change, and how this can change. In this second part of the report, I will indicate some particular situations with regard to specific land claims in which these general issues arise, situations upon which the Beaufort Sea - Mackenzie Delta hydrocarbon development proposals may have a significant effect, and in doing so effect the nature of native land claims, and the possibilities for achieving the kind of northern development which incorporates their priorities and recognizes their prerogatives.

For a start, it would appear as though the 'principles' informing 'agreements-in-principle' with native groups have a more flexible character than those which inform the 'approvals-in-principle'between industry and government. Such, at any rate, seems to be the case with the agreement-in-principle on an Inuvialuit Land Rights Settlement, signed by the Committee for Original People's Entitlement and the Government of Canada on October 31, 1978.

The history of this agreement is brief, and instructive. The Committee for Original People's Entitlement (COPE) had originally developed a joint claim with Inuit Tapirisat of Canada (ITC), which was presented to the federal government early in 1976 and withdrawn later that year. By the end of 1976, COPE had decided that oil and gas development in the Western Arctic was putting sufficiently urgent pressure on their interests to require more

immediate and specific attention, and with the agreement of ITC, COPE proceeded to develop and in May of 1977 to submit its own claim, Inuvialuit Nunangat--Land of the Inuit of the Western Arctic. Negotiations proceeded quickly, with both sides clearly determined to find ways of reaching agreement; and within eighteen months an agreement-in-principle was signed, with legislation giving effect to a final agreement anticipated by December 31, 1981 at the latest.

The COPE agreement-in-principle had some contentious elements. It exchanged "any Inuvialuit land rights that exist" for "specific rights, benefits and compensation"--that is, it extinguished rather than entrenched rights--and thereby set itself apart from other northern land claims which seek to confirm and define continuing rights. Furthermore, it constituted a settlement which, while negotiated on behalf of the Inuvialuit, seemed to foreclose the possibility of any other kind of comprehensive settlement for other native people of the Delta, some of whom for example are Dene. Finally, it included in its provisions a regime for the "wildlife protection and wilderness conservation" of lands in the northern Yukon, lands over which the Yukon government subsequently reaffirmed its jurisdiction, and which included some areas which by virtue of the traditional activities of the people of Old Crow would normally be included within any settlement flowing from the land claims put forward by the Council for Yukon Indians (CYI).

I mention these elements of the COPE agreement-in-principle because they are contentious and because both individually and together with other elements of the agreement they have complicated the progress towards a final agreement. These other elements include provision for surface rights analogous to those of private land owners, rights which may conflict both with Dene claims and with the posited need of the oil and gas industry for unrestricted or 'secure' access; and the provision for 'participation agreements' which would ensure

an Inuvialuit quid for the industry quo--a provision which has been criticized, perhaps as a negotiating strategy, as burdensome. Also, there is provision for compensation for loss of wildlife productivity, a new and possibly radical shift in approach that unnerves both government and industry. Then there are the more general questions (or perhaps answers) which arise as a result of the agreement-in-principle, such as the relationship of the structures which would be a part of its implementation to new forms of regional or municipal government, and perhaps to new territorial arrangements, with or without division of the Northwest Territories. And there are ideological differences between the cooperative principles of the Inuvialuit Development Corporation, created under the terms of the agreement, and the competitive free-enterprise commitments of some local Inuvialuit business interests, especially in communities such as Tuktoyaktuk. These are apart from the endemic constituency issues, regarding the quantity and quality of continuing support for the agreement-in-principle, though I have less patience with this issue than with some others, and in any case it applies to all parties in these sorts of situations.

And yet, and yet, and yet...over and above all of these matters, the COPE agreement-in-principle is the expression of a land claim, negotiated into a form with its own logic and coherence, a regional development proposal with its own terms of reference and its own substantial authority. And it has been treated as something between an insult and an inconvenience by industry and government, those other two sides of the northern triangle. Industry, for its part, is anxious to arrange a more convenient marriage between its own interests and what it perceives to be those of the Inuvialuit. The Yukon government, outraged at what it deems a threat to its jurisdictional integrity and constitutional development, has easily found common cause with industry, not least of all because its economic analyses indicate that access to the Beaufort Sea is the key to any middle and long term economic stability

and self-sufficiency that it might enjoy. The federal government appears to have cooperated in this attitude towards the agreement-in-principal, making it seem as though some agreed principles are less agreed upon than others.

Now all of this is especially curious in the light of the current enthusiasm by both government and industry for regional planning, since the COPE agreement-in-principle is before all else the product of a planning intelligence, negotiated on the federal side by one of the most experienced land use planners in the north at the time, John Naysmith, on premises which he had promoted in his 1975 study of Land Use and Public Policy in Northern Canada, when he made a distinction between the old way and the new:

> Beginning with the Dominion Lands Act, public land policy in the North has been essentially a series of responses to demands for land, rather than a framework within which decisions respecting use and management are made on the basis of the land itself.

Furthermore, the government's present reconsideration needs to be put in perspective, for it was certainly made aware of the implications of the agreement-in-principle before it signed, specifically with regard to what would seem to be the most significant issue, the conflict with Yukon jurisdiction on the north shore. The truth is that there is little reason--the Yukon to be sure has little reason--to think that the attitude of the federal government to its jurisdictional prerogatives has changed. What has changed is the discovery by industry of the convenience of keeping as many options as possible open, and the perception by government that this is an industrial approach that has merit and deserves support. And so the federal government appears to be willing to jeopardize its credibility as a negotiating party in order to satisfy the appetities of oil and gas developers for ports and roads, where it would not lift a finger on behalf of a territorial government or another native group with interests conflicting with those of the Inuvialuit. Whatever the government's logic, this is the unmistakeable perception of its actions. And it

does not bode well for the effect of hydrocarbon development in the Beaufort Sea - Mackenzie Delta region on native land claims in general, and in other areas. If the port on Herschel Island provided for in the COPE agreement-in-principle, and the port at McKinley Bay provided for by agreements between industry and government, are not satisfactory, even though themselves the result of considerable planning, then there is not much reason to have confidence in industry's next few choices. And if industry and government cannot accept the matter of fact character of political geographies as well as of physical geographies, and cannot abide by the authority of an agreement-in-principle, then there is cold comfort for the native people of the north, and little reason to think that native land claims can assert their autonomy in the fact of such relentless (even if unconscious) collusion. The Inuvialuit seek a self-sufficiency immune from government procrastination and government vaccilation; the government may have time, but the Inuvialuit do not.

The Dene Nation and Metis Association of the Mackenzie Valley are in a different situation with respect to the hydrocarbon development proposals now before the Beaufort Sea Environmental Assessment Panel, and their land claims are of a different character, and at an earlier stage in the process leading towards settlement. The Dene in particular have consistently argued their claims on the basis of aboriginal title, rather than original use; and have put forward a claim in which political and constitutional issues are central. Aboriginal title implies both traditional occupation and a recognizable system of laws and customs; this latter is a key element, since the notion of aborginal title seems to depend for its legal authority on there being a social and economic structure in place at the time of European settlement (and of course since that time), a structure which might be acknowledged as constituting a civil order analogous (though of course not in any sense necessarily identical) to European, and particularly English, systems. The Dene propose that this

traditional structure form the basis for a new constitutional status for the native people of the Mackenzie Valley. In order to support their claim to aboriginal title, the Dene have developed a basis of geographical and anthropological data; and their claim essentially proposes that the concept of development in the Mackenzie Valley begin rather than end with the possibilities for a development that is congruent with Dene traditions of land use and occupancy and of social, economic and political structures.

The consistency of their argument is significant, for it is in marked contrast to the inconsistency of the arguments of government and industry. Some years ago, the government began the process of considering northern hydrocarbon development with two basic documents: Canada's North 1970-1980 and the Pipeline Guidelines. The key was Canada's North 1970-1980, which was presented to the Standing Committee on Indian Affairs and Northern Development on March 28, 1972; it was the product of extensive consideration, and in its central features had been developed in the form of a memorandum entitled 'National Objectives for Northern Canada' which was presented to cabinet in November, 1970. Canada's North 1970-1980 spoke about enhancing "the quality of life... for northern residents by methods which are compatible with their own preferences and aspirations", and although it emphasized a middle way or balance between competing interests, it did establish a clear set of priorities, affirming that "the needs of the people in the North are more important than resource development and...the maintenance of ecological balance is essential". In some ways, the development of native land claims has been directed towards answering the question of which needs, and which people.

The beginning of Canada's North 1970-1980 refers to the north as "a show-piece in which a distinct image of Canada can be identified and reflected for all Canadians and other nations to see". This signifies an attitude which links the cavalier political enthusiasms of the 50s with the earnest arguments

of the 70s. When John Diefenbaker announced his vision of a 'new Canada, a Canada of the North' on February 12, 1958, at the beginning of the electoral campaign leading to his landslide victory, he was both inaugurating his program of 'roads to resources', and establishing for Canada a version of the American historian Frederick Turner's thesis that what a nation does on its frontier indicates the character of that nation, and the values it cherishes. Almost twenty years after Diefenbaker's remarks, the idea was still intact, as Mr. Justice Thomas R. Berger argued in his Report of the Mackenzie Valley Pipeline Inquiry that 'what happens in the North will tell us what kind of a country Canada is; it will tell us what kind of a people we are'.

The other key document was the Pipeline Guidelines first issued by the government in 1970 and expanded in 1972, which emphasized "the influence of the first trunk pipeline in shaping the transportation corridor system and in moulding the environmental and social future of the region" and required any oil and gas developer to address the issue of cumulative impact. When the Mackenzie Valley Pipeline Inquiry was appointed in 1974 under Judge Berger it was bound by the order in council establishing it to consider how the pipeline applications before it "met the specific environmental and social concerns set out in the Expanded Guidelines". In the report of the Inquiry submitted in 1977, the Commissioner explicitly acknowledged these premises:

> I have proceeded on the assumption that, in due course, the industrial system will require the gas and oil of the Western Arctic, and that they will have to be transported along the Mackenzie Valley to markets in the South. I have also proceeded on the assumption that we intend to protect and preserve Canada's northern environment, and that, above all else, we intend to honour the legitimate claims and aspirations of the native people. All of these assumptions are embedded in the federal government's expressed northern policy for the 1970s.
>
> The proposed natural gas pipeline is not to be considered in isolation. The Expanded Guidelines for Northern Pipelines...assume that, if a gas pipeline is

> built, an oil piepline will follow, and they call for examination of the proposed gas pipeline from the point of view of cumulative impact. We must consider, then, the impact of a transportation corridor for two energy systems, a corridor that may eventually include roads and other transportation systems.
>
> The construction of a gas pipeline and the establishment of an energy corridor will intensify oil and gas exploration activity all along the corridor. The cumulative impact of all these developments will bring immense and irreversible changes to the Mackenzie Valley and the Western Arctic.

Furthermore, the conclusions of the report directly reflected these obligations:

> Native people desire a settlement of native claims before a pipeline is built. They do not want a settlement-- in the tradition of the treaties--that will extinguish their rights to the land. They want a settlement that will entrench their rights to the land and that will lay the foundations of native self-determination under the Constitution of Canada.
>
> The native people of the North now insist that the settlement of native claims must be seen as a fundamental re-ordering or their relationship with the rest of us. Their claims must be seen as the means to establishing a social contract based on a clear understanding that they are distinct peoples in history. They insist upon the right to determine their own future, to ensure their place, but not their assimilation, in Canadian life.
>
> The federal government is now prepared to negotiate with the native people on a comprehensive basis, and the native people of the North are prepared to articulate their interests over a broad range of concerns. These concerns begin with the land, but are not limited to it: they include land and land use, renewable and non-renewable resources, schools, health and social services, public order and, overarching all of these, the future shape and composition of political institutions in the North....
>
> The settlement of native claims is not a mere transaction. Intrinsic to settlement is the establishment of new institutions and programs that will form the basis for native self-determination. It would be wrong, therefore, to think that signing a piece of paper would put the whole question behind us, as if all that were involved was the removal of a legal impediment to industrial development. The native people insist that the settlement of native claims should be a beginning rather than an end of the recognition of native rights and native aspirations. In my opinion, a period of ten years will be required in the Mackenzie Valley and Western Arctic to settle native claims, and to establish the new institutions and new programs that a settlement will entail. No pipeline should be built until these things have been achieved.

But the assessment of the Norman Wells pipeline project by an Environmental Assessment Review Panel and the National Energy Board marked not simply a departure from but a disintegration of the policy framework; and the subsequent approval of this project by the government confirmed this, even with the two year delay to allow for the satisfying of native interests. For what was absent from this exercise was any thoroughgoing consideration either of the project as an initial step down an industrial valley or of native interests as a part of the physical and political geography of that valley. As a result, native land claims in the valley continue to lack the clear focus that a particular occasion provided the Inuvialuit, or that a particularly convenient territorial designation and population ratio provides the Inuit of the central and eastern Arctic.

The proposal for hydrocarbon development in the Beaufort Sea - Mackenzie Delta area may further bedevil this situation. It is of course a different project. But it is the same industry and the same government, and both have adopted approaches that seem to differ from those in effect when these land claims were formulated. Furthermore, it is not an uncommon perception to see the Norman Wells Interprovincial Pipeline Project from Norman Wells to Zama, Alberta as the first phase of Beaufort Sea - Mackenzie Delta development. The shift by both industry and government towards the promotion of demonstration projects, and the attitude by the government of co-operating with industry (within the admittedly inconvenient limits of the National Energy Program), have reduced the concern for native land claims to a specific concern that industrial and governmental activity not compromise land claims negotiations. This begs the question of the nature of land claims in themselves, of the place of those native interests which inform land claims in a developing north, and of the priority to be given to those interests in determining the character, pace and direction of northern development. It is this question that the

Beaufort Sea Environmental Assessment Panel, and indeed all responsible parties, must address. Insofar as the Beaufort Sea - Mackenzie Delta hydrocarbon development proposal shows the same disregard for the letter and the spirit of native land claims as that demonstrated by the Norman Wells initiative, and insofar as the federal government conspires in treating land claims as incidental rather than as essential, then to that degree will Dene and Metis land claims be reduced to frustrating, peripheral exercises, isolated from both the meaning and the moment of northern development.

Historical Background

Many of the issues raised by native land claims have taken shape in the north fairly recently, but are part of a long history of relations between native people and white settlers or sovereigns. It was during the 1950s and 1960s that the north saw the first of the major changes regarding its native people, as the government extended the mixed blessings of centralized social services. Social, economic and political factors were involved. Questions of national sovereignty, which had originally prompted the establishment of police posts in the north, were also part of the motivation after the second world war for the extension to the Inuit of the family allowance scheme to which all Canadian citizens had become entitled in 1945. This followed, perhaps incidentally, a decision of the Supreme Count of Canada in 1939 that the federal responsibility for 'Indians, and lands reserved for Indians' which is defined in Section 91(24) of the British North America Act included Eskimos. The debilitating aftermath of wartime activity in the north and of DEW line construction; the decline of fur prices, at times to one-tenth of previous values, after the war; the decline in some game populations and the introduction of new and often irritating fish and game regulations; the epidemic and increasingly endemic incidence of malnutrition (as country food

was replaced with store bought food without any sense of how to balance the new diet), tuberculosis, influenza and gastro-enteritis...all of these, and other related factors, created an urgent need for assistance, to which the federal government responded with extensive health, housing and education programs. This period coincided with the recognition of non-renewable resource (at this time mainly mineral) potential, so that the government was turning its attention to the north for a variety of reasons, and accordingly did so with a kind of benevolent vengeance. There is no doubt that the social assistance programs initiated at this time were well-intentioned; there is also no doubt that they were often ill-considered and poorly designed, creating a pattern of dependency to replace the habits of independence which had in particular sustained the native people in the north for so long. As an example, the housing programs of the 60s were in large part prompted by a general concern about the poor conditions, and especially the appallingly high infant mortality rate (during the 50s, seven times higher than the national average) in the northern settlements. A booklet was published in 1960 by the departments of Health and Welfare and of Northern Affairs and National Resources, which had joint responsibility for native health services. It was entitled Eskimo Mortality and Housing and provided a pictorial look at the squalour and wretchedness of much of the housing that served as temporary or permanent shelter for the northern natives. It is a distressing book to look at, not only because of the conditions which are so graphically displayed, but also for the notes and comments on many of the illustrations, which give evidence of a frightening ethnocentricity and plain insensitivity on the part of its author, and of an implicit policy which would soon be foisted on the Eskimos, for their their own good and in order to improve the health statistics. Under one picture, of a very neat and tidy shelter, there is the following inscription:

> The owner of this tent at Resolute (Bay) was able to get a proper bed and bedding. Eskimos stabilized in one place soon try to acquire better furniture, bedding, utensils and even phonographs and radio receivers. They seem to enjoy collecting bottles and odds and ends--note the badminton bird!

To the badminton bird as clear evidence of cultural idiocy (or childishness), there is added a tacit argument for the 'ordering' and 'stabilizing' of the lives of the Eskimo people. It would be a small matter, in a small publication, were it not that this pamphlet was one of the key elements in an orchestrated program of cultural change. The cure which was administered for these medical ills and cultural disabilities was, in many respects, much worse than the disease, for the government embarked upon a massive (and very expensive, though poorly designed) housing program as part of a strategic plan to force the Inuit into new forms of social organization which were supposedly made necessary by settlement living and the influences of modern society. The plan was reinforced by a corps of home economists, who were to initiate northern native people into the mysteries of proper home management.

Planning of the details of such programs is one thing; but even more important is over-all control of the programs, including control of their purpose and scope. The period leading up to the 70s in Canada was not distinguished by much progress in giving over control of such matters to native people in the north.

However, in 1969 the government did put forward its white paper on Indian Policy which, while it specifically applied to those registered under the Indian Act, clearly laid out principles which would presumably apply in time to all native people in Canada. The policy was part of the federal government's objective of achieving 'a full and equal participation' of all its citizens 'in cultural, social, economic and political life in Canada', and in particular a fuller integration of the native peoples into Canadian society. Basically, the government proposed a phased ending of special status for Indians registered under the Indian Act, and a relinquishment of federal

trusteeship of Indian lands and interests by replacing the Indian Act with an Indian Lands Act that would transfer control of those lands to the Indians themselves. Corresponding to this, it was intended that the native people would be brought into the same sphere of influence as other Canadian citizens, through the transfer of responsibility for their welfare from federal to provincial and municipal jurisdictions. The Indians in general reacted strongly against this proposed policy, arguing that they need and deserve a special and extraordinary status, some kind of Canadian 'citizenship plus'. Provincial authorities in Canada have never displayed much inclination, nor have they always had sufficient means, to give special attention to native people; and the possibility of being thrown to these and other waiting lions has never been attractive to the Indians and Inuit, quite apart from what they both see as their special historical and constitutional relationship with the federal government, a relationship which they are not willing to relinquish, and which they cannot accept might be terminated unilaterally. There is little doubt that the policy was ill considered: it ignored the practical realities of the situation, as well as the advice which should have been apparent both from the meetings which were held across the country with Indian groups during the preceding years, and from the government-sponsored Survey of the Contemporary Indians of Canada: A Report on Economic, Political, Educational Needs and Policies, edited by H.B. Hawthorn, and submitted in 1966-67, in which the concept of a 'citizen plus' was given a full and sympathetic examination. There were two positive effects of the policy statement, however. As a consequence of the government's expressed wish to deal only with Indian associations in discussing Indian policy, a number of such provincial, territorial and national associations were either formed or given renewed purpose, were federally funded, and were during the next decade able to provide a focus for and new definitions of native concerns. In addition,

a Commissioner on Indian Claims was appointed to facilitate the settling of outstanding treaty and other claims.

On the claims side, the 50s and 60s preceded the development of a thoroughgoing approach by the federal government; but the Nelson Commission was appointed in 1959 to inquire into all matters arising out of the unfulfilled provisions of Treaties 8 and 11 as they applied to Indians in the Northwest Territories. The commission found a regrettable lack of understanding of the issues among the Indians, and few opinions were forthcoming on the matter under consideration, even though an all-chiefs meeting had been convened two years earlier to raise the issues. In fact, the commission lamented that in the intervening period there had been no concerted effort to familiarize the Indians with the issues, which was precisely the sort of consciousness-raising exercise that proved to be so crucial for the Indians of the Mackenzie Valley during the Berger Inquiry, and which was so strongly criticized in some quarters as skewing the evidence by orchestrating the responses. The Indians expressed the view to the Nelson Commission that since they had the right to hunt, fish and trap over all of the land in the territories, the land belonged to them; and the Commission 'found it impossible to make the Indians understand that it is possible to separate mineral rights or hunting rights from actual ownership of land'. Finally, the Commission recommended against the establishment of reserves (which was the obvious way of fulfilling part of the treaty provisions) because the Indians did not want to live on reserves, would not be able to make a living from reserve lands in the Mackenzie district even if they did want to live there, and in any case it was the view of the Commission that the establishment of reserves would impede the social and economic advance of the Indians by segregating them from the rest of the population.

In the past decade, the north has become much more defined by its native

people--by their prerogatives and priorities, and by the possibilities (in addition to the pathos) of their situation--in the minds of southern Canadians than was the case a decade earlier. There are many reasons for this, some of them having to do more with the minds of southern Canadians than with the situation of northern native people. In statistical terms, the situation has on the whole perhaps not changed dramatically. Population ratios have remained roughly the same (about 55% of 46,000 in the Northwest Territories are native people, 25% of 23,000 in the Yukon); and while social and economic indicators have shown some change, it has not been dramatic, nor is it in some cases easy to assess whether, from the perspective of the native people themselves, the direction has been forward or backward. Social services have increased; but so has welfare dependence. Certainly, the quality and diversity of northern educational services has improved, though it is at times no clearer in the north than it is in the south to what end; and control is still, in the main, central rather than local. Housing is much better; and diseases such as tuberculosis are much less evident. Life expectancy is up, while infant mortality is down somewhat. No human being could do anything but applaud these last changes. But other pathologies seem to be on the increase, especially alcoholism, violent crime, child neglect, and related syndromes.

However, it could not be said in the 70s, as it was routinely in the 60s, that the native people have lost their sense of identity and pride, or that traditional values have gone the way of the dogsled. The native organizations have contributed much to this renaissance; and their constituent support, variable though it sometimes is, is in itself an impressive indication of their significance. For unlike, for example, territorial councils, the native organizations have no water trucks or hamlet council offices to offer their constituents. What they have, of course, is the possibility of a satisfactory land claims settlement. Land claims have become a central

factor in the north. To some, to the developers and promoters of non-renewable resources, as well as to the promoters of early provincial status for the territories, the claims are something of an impediment. To others, and especially to the native people, they hold promise for the future. Much attention is often given to native claims as the reason for the often debilitating uncertainty that affects northern affairs. This is partly true, but only partly; market forces, and confusing regulatory and decision-making processes, must take equal credit or blame. One of the worrying features about this sort of model, however, which is encouraged by native positions that there be no pipeline, or whatever, before land claims are settled, is that it contributes to the misapprehension that when claims are settled, the file can in a sense be closed on the native interests that give rise to the claims. The language itself is distracting, and introduces a habit of mind: to settle native claims is, in many respects, understood as different in degree but not in kind from settling any other claim. The premise is development, the issue is compensation, the ambition is to close the file. The most immediate examples of such settlements--the Alaska Native Claims Settlement Act and the James Bay Agreement--are not encouraging in this regard, though no one who knows much about them would pretend that they settled the issue of the functioning of the collective native interest in the regions' social, economic and political arrangements.

The northern native claims developed in their present form in the early 70s. Their development may have been the product of a general coincidence of native national consciousness informed by a sense of history, and industrial activity informed by a sense of urgency--after all, the claims are a decade or a century old, depending on one's perspective--but the claims took the form they did, and led to the processes which were established, as a result of some particular events. The dissenting judgment written by

Mr. Justice Emmett Hall in the Supreme Court decision in the Calder case involving the aboriginal rights of the Nishga, delivered in 1973, presented a powerful argument for the continued existence of aboriginal rights where they had not been explicitly extinguished by sovereign government action, an argument that was not substantively rejected by the decision in the case, which rested on a technicality. Along with this, there came the presentation by the Yukon Indians of their claim--Together Today for our Children Tomorrow --based on aboriginal rights, in which they developed a reasoned and reasonable approach to the settlement of their claims and entrenchment of their interests. Together, these played a large part. The activities of Lloyd Barber, the Commissioner of Indian Claims, in assisting both the Yukon Indians and the federal government to come to the point where the claim could be both put forward and considered was crucial; and all these events in 1973 prompted the government to develop its policy on native claims, in which it committed itself to negotiate settlements related to what were termed 'comprehensive claims' with native groups in those areas of Canada where any native rights based on traditional use and occupancy had not been extinguished by treaty or superseded by law. The decision in October 1973 by Mr. Justice William Morrow of the Supreme Court of the Northwest Territories to allow the chiefs of the Dene nation to file a caveat on the basis of aboriginal rights claiming prior interest in lands at that time subject to possible alienation for a pipeline, though it was later over-ruled, nonetheless reinforced the plausibility of the native claims based on aboriginal rights, and indicated the necessity of approaching the matter of these claims with both dispatch and imagination. It was Barber who put the claims in a constructive perspective when, in a speech in Yellowknife in 1974, he noted that:

> ...native people are seriously talking about a distinctly different place within Canadian society, an opportunity

> for greater self-determination and a fair share of resources, based on their original rights. No doubt this will require new and special forms of institutions which will need to be recognized as part of our political framework...The old approaches are out. We've been allowed to delude ourselves about the situation for a long time because of a basic lack of political power in native communities. This is no longer the case, and it is out of the question that the newly emerging political and legal power of native people is likely to diminish. We must face the situation squarely as a political fact of life but more importantly, as a fundamental point of honour and fairness. We do, indeed, have a significant piece of unfinished business that lies at the foundations of this country.

A look at the foundations may be instructive. Canada has a tradition, which seems to have been lost sight of in the mists of time, of accepting the idea of native sovereignty. And the native people have a tradition of accepting the sovereignty of the nation of Canada while maintaining a sense of their own sovereignty within that larger dominion. In 1871, the new Dominion of Canada began treating with the Indian nations in the northwest, with the series of so-called numbered treaties which for over half a century defined a central element of native affairs in Canada. Canada proceeded--Canada has always proceeded--with one eye on what was happening in the United States; and what was happening in the United States gave a particular significance to Canada's treaty process. In the same year that Canada as a nation began its treaty-making, the United States had passed an amendment to its Indian Appropriations Act to the effect that 'hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty'.

Treaty-making in Canada therefore proceeded in distinct and self-conscious contrast to the American renunciation of its treaty policy, a renunciation which led to legislative changes that Theodore Roosevelt applauded at the end of the century as 'mightly pulverizing engines to break up the

tribal mass'. Canada's treaty policy confirmed tribal autonomy, and involved a recognition of the status of Indian nations as sovereign groups requiring acknowledgement by the government of Canada.

Now it is 1983, and the native nations are still with us. They are still there in the United States as well, in defiance of legislative ambitions. A recent judgment of the United States Supreme Court, handed down in January of 1982 upheld the power of Indian tribes to collect taxes on natural resources taken from their reserves, and based this decision on 'the conception that Indian tribes are domestic dependent nations'. The power to tax, in the language of the judgment, 'derives from the tribe's general authority, as sovereign, to control economic activities within its jurisdiction...as part of its power to govern and to pay for the costs of self-government'.

The phrase 'domestic dependent nations' is an old one, and was originally that of United States Chief Justice John Marshall, coined in a decision in 1831 during the period of agitation over the removal of the Indian tribes from Georgia. Andrew Jackson remarked that the recognition of the nation status of Indian tribes upon which the treaty process relied was 'an absurdity not to be reconciled with the principles of our government'. Marshall, while agreeing that the Indian nations were anomalies, if not absurdities, used just this anomalous character to fashion a logic according to which Indian sovereignty, as a contingent rather than an absolute idea, might be reconciled with an overarching American sovereignty. It was a rather disconcerting notion for the 1830s, though the concept of a contingent sovereignty may be more familiar to us/ as Canadians. But we still have difficulty getting beyond a sort of nervous dismissal of the constitutional pluralism which forms the basis of notions of native self-determination and self-sufficiency. While nature abhors a vacuum, politicians and administrators seem to abhor anomalies. Some leaders in Canada and the United States have been particularly energetic

in seeking to hasten the disappearance of these anomalous elements. Others have been less strenuous, merely regretting that the world is not as tidy as they might wish, and waiting for the native people to wean themselves away from their primitive habits and indigenous affiliations. Whatever the response, however, what we have is basically a single way of answering what used to be referred to as the 'Indian question': get rid of the Indian; or (if that is not possible) of Indian-ness.

But the native people have not disappeared, neither have they been weaned away from their anomalous ways nor crushed by the engines of progress. They have changed in some ways, of course, and they have been battered about more than a bit. Yet they are still there, as intransigent--and as anomalous--as ever. One hundred and fifty years later, the notion of native nations is as much a fact of life as it ever was. We might as well recognize it, for it is not about to go away. This is not idle theory; it is practical politics.

'To hinder insurrection, by driving away the people, and to govern peaceably, by having no subjects, is an expedient that argues no great profundity of politics. It affords a legislator little self applause to consider, that where there was formerly an insurrection, there is now a wilderness'. This was Samuel Johnson, writing of his Journey to the Western Islands of Scotland in 1773, and lamenting the drastic social and economic decline suffered by the Highlands and Hebrides. He suggested that the people should be allowed to address the difficulties they faced on their own terms, rather than according to the perspective--Johnson's apt is 'estimation'--of another culture, especially one so uncongenial to northern priorities and prerogatives as eighteenth century enlightened materialism, which had (to take just one example) suspended the traditional right to customary control over law and order in local jurisdictions in the interests of more efficient administration. There always seems to be an inclination by governments 'to govern peaceably,

by having no subjects'--or, to put it differently, to deal with problems such as those inherent in native affairs by obliterating all that is distinctively native in the course of attending to the variety of other affairs (such as unemployment, housing, poverty, despair). It won't work. It has never worked. One hundred and fifty or two hundred years haven't done the trick, and there has been no shortage of good (or evil) intentions during that time. Canada is Canada not only because of its unique commitment to French and English cultures, but because of its unique commitment to its native nations.

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The Council for Yukon Indians has a decade of experience at land claims negotiations, and at working within a confusing array of political attitudes, negotiating formats and industrial development activities. Quite understandably, one of the responses of the Council for Yukon Indians has been to modify its land claims proposal to reflect changing situations, and negotiations have been proceeding for the past couple of years on the basis of a proposal put forward by the Council for Yukon Indians in January, 1979. This followed the suspending of discussions in the summer of 1977, after a tripartite planning council (composed of representative of the Council for Yukon Indians, the Yukon Territorial government and the federal government) had put forward a 'settlement model' which outlined the shape and illustrated the elements of a possible agreement-in-principle. The settlement model was committed to a concept of comprehensive regional planning not unlike that which later informed the COPE agreement-in-principle. CYI's subsequent revaluation of the model as an inappropriate framework was precipitated by several factors, among them the failure of the report of the Alaska Highway Pipeline Inquiry under Dean Kenneth Lysyk in 1977 to incorporate the principles informing the settlement model into its assessment of the situation in the Yukon. The effect of this was to demonstrate how unable or unwilling a broader constituency was to take seriously the interests which prompted and sustained native

land claims--or, more precisely, how willing and able that larger constituency was to perceive those interests in a form more conveniently reconciled with other interests, especially industrial or governmental interests. This was reinforced by the inconsistently argued Record of Decision of the National Energy Board regarding the Canadian Arctic Gas and Foothills Pipeline applications; by the subsequent approval of the Alaska Highway Gas Pipeline by the federal government; by the appointment of C.M. (Bud) Drury as Special Representative for Constitutional Development in the Northwest Territories with terms of rererence provided by a policy statement issued on August 3, 1977 specifically on 'Political Development in the Northwest Territories' but with general application in the Yukon as well; and by a change in leadership within the native organizations in the Yukon.

The key point here is that any failure to acknowledge native land claims as the premise for social, economic and political development in general will undermine the possibilities of achieving a responsible framework for northern hydrocarbon development in particular. One of the hazards is that the Beaufort Sea Environment Assessment Panel may proceed, as the proponents have proceeded in their Environmental Impact Statement, by adopting the kinds of analysis that applied with respect to land claims in the 1970s, the notions and processes of comprehensive regional planning. This may come as a surprise to many people, but these are not the primary terms of reference and kinds of analysis that apply now, though of course they continue to inform the COPE agreement-in-principle, and to a lesser extent some of the components of the land claims of CYI, and will certainly play an important role in determining some of the mechanisms that are developed to implement land claims settlements. But the new focus is on constitutional matters, on relationships between jurisdictions or sovereignties or autonomies of one sort or another, on the nature and extent of rights and obligations. This new focus is of course

determined in part by the new Canadian constitution and by the federal government's preoccupation with it for the past couple of years, as well as by continuing discussion of constitutional arrangements between the territorial and the federal governments, and by serious questions that have emerged over the past few years about the statutory authority of some federal departments and about the way in which it is being exercised or waived. Native leaders in the Yukon and Mackenzie Valley, as well as in the central and eastern Arctic, have played an important role in the constitutional discussions, especially relating to the Charter of Rights. The forthcoming constitutional conference may provide a forum for a further development of constitutional relations between the native groups in the north--those putting forward native land claims--and the federal government, as well as between the native groups and the territorial governments. Furthermore, the importance of offshore hydrocarbon development rights and of hydrocarbon transportation and export as constitutional issues clearly affects the northern situation in a significant way, and anything that significantly affects the northern situation significantly affects native land claims. It is this simple truth which seems to require continual repetition.

To ignore the constitutional framework within which native land claims will take shape in the 1980s would be foolhardy. It may change in some features, of course; but the Canadian constitution and the evolving and inevitably controversial definitions of the nature and extent of aboriginal rights which will undoubtedly follow over the next few years will determine northern political and constitutional development. Native groups will be trying to maintain the distinctive character of their different land claims while taking advantage of the general direction of new constitutional arrangements, which will almost certainly include as well a new or considerably revised Indian Act. The Council for Yukon Indians, with its formidable

experience in this area, can be expected to take a major role in this process; and it is a process that cannot be separated from hydrocarbon development in the north, especially when the proposal both asks and invites important jurisdictional questions about the northern Yukon and about resource ownership, regulations and revenue sharing.

The Council for Yukon Indians has reached a difficult stage in its negotiations with the federal government. Agreements have been reached on a number of matters, including entitlement; hunting, trapping and fishing rights and wildlife management; housing; education; health care; land use planning and environmental assessment. A scheme for land selection has been established, and a sum of money has been agreed upon as constituting part of an eventual settlement, though with the monies unavailable in the immediate future. Separate from the land claims negotiations, a Yukon Indian Development Corporation has been set up to provide a framework for the implementation of some components of a settlement. Like the Inuvialuit Development Corporation and similar entities proposed or established by other native groups in the north, it can be misinterpreted as contradicting some of the traditional premises of land claims. That is, the existence of development corporations, as of native people who take wage employment, and of native children who want to fly airplaines when they grow up, are routinely used to sustain an argument that the principles of native land claims, insofar as they go beyond greed for land and money, are anachronisms which the native people themselves have already moved well beyond. This perception is both foolish and incompetent. Native development corporations, like all human inventions, cannot be perfect but they can expect to be unique--a way of being Together Today for Our Children Tomorrow to use the words of the Council for Yukon Indian land claims. It is this uniqueness that is liable to be obliterated by hydrocarbon development that proceeds on the assumption that native

development corporations either operate from the same premises or have the same corporate goals as industrial development corporations. And it is not enough simply to say this; the differences must be specifically identified and highlighted, if the similarities are to be effectively harnessed. The only way of doing this is to bring forward the premises and principles of native land claims to see the ways in which the native development corporations have their beginnings there, and are intended to support, sustain and strengthen the social structures and economic relationships of native groups, while taking advantage of new possibilities beyond the specifically political or constitutional. It would be a sad mistake if native development corporations came to be looked upon as convenient mechanisms for co-option as well as for co-operation, or (more benevolently) as rather flashier modes for government transfer payments thorugh favourable regulatory regimes. Industrial development in the north should start with the native development corporations--and with other distinctly northern entities as well, of course--as it has to some degree in the Mackenzie Delta, with the activities of the Inuvialuit Development Corporation. It is back to making things happen...or letting things happen. But massive hydrocarbon development will take that initiative away from the native development corporations, unless their distinctive character is recognized and confirmed as basic to the idea of northern development; and this character can only be recognized and confirmed if the distinctive character of particular land claims is recognized.

The land claims of the Inuit of the central and eastern Arctic have developed over several years, and the basic premised were outlined in July, 1977 and in September, 1979 in proposals put forward by Inuit Tapirisat of Canada. Negotiations have been intermittently underway since then, and agreement has been reached on wildlife harvesting rights and management regimes. The key component of the ITC claim proposal is the establishment of

a territory to be called Nunavut, which would constitute a self-determining Inuit constitutional entity within confederation, and this component cannot be separated from the particular issue of division of the Northwest Territories, and from the general constitutional issues relating to aboriginal rights that need to be addressed by the federal government and the native groups. In addition, however, there is a desperate need for regulatory regimes adequate to assess and advise on marine transportation in Arctic waters crucial to Inuit economic and social--and in the context of their land claims, specifically political--interests. The proposition that seems to be gaining ground --that the decision to be made is which of pipelines or tankers would be the better transportation mode--is precisely the sort of proposition that provides an inadequate context for a consideration of the relationship between native land claims and northern hydrocarbon development, since it begs the question of the consequences of pipelines and tankers. Furthermore, approval-in-principle of the hydrocarbon development proposal now before the Beaufort Sea Environmental Assessment Panel would compromise the ITC proposal, by pre-empting the development of responsible regulatory structures in areas of interest to the Inuit. Insofar as it would do this--and I suggest it would do this to a very large extent--it would undermine the premises of ITC land claims. It might also, of course, obliterate a lot of sea life; but in any event it would compromise the people's ability to make things happen, and interfere with the ways in which this ability finds an image in cultural structures, in social, economic and political arrangements, and in constitutional relationships. The Beaufort Sea Environment Assessment Panel has an obligation not just to consider this, but to make it plainly understood by all.

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